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No. 79-1841

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

GRANDDAD BREAD, INC.,
Petitioner,

v.

CONTINENTAL BAKING COMPANY,
Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

E. EDWARD BRUCE
CORINNE A. GOLDSTEIN
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

NANCY P. GIBBS
DAVIS, WRIGHT, TODD,
REISE & JONES
4200 Seattle-First National
Bank Building
Seattle, Washington 98154

Attorneys for Respondent
Continental Baking Company

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Respondent, Continental Baking Company ("Continental"), herein opposes the petition for certiorari filed on May 20, 1980, by Granddad Bread, Inc. ("Granddad").

QUESTIONS PRESENTED

1. Did both of the courts below err in concluding that a work preservation clause in a collective bargaining agreement between the Teamsters and the Seattle bakers could not serve as the basis for imposing antitrust liability upon the signatories to the agreement?

2. Did both of the courts below err in concluding that, aside from the collective bargaining agreement, there was insufficient evidence of any other agreement between Continental and other alleged co-conspirators to support the jury's findings of conspiracy?

STATEMENT OF THE CASE

Traditionally, all of the bakery products produced by the major wholesale bakers in the Seattle market, including Continental, were distributed by driver-salesmen represented by Teamsters Local 227. These employees delivered the products with "rack service" at the retail stores: They brought the products into the stores, displayed them on the grocers' shelves, and retrieved stales for return to the bakeries. (Tr. A 36).

In 1960, one of the bakers tried to change these working arrangements when it entered into a contract with a retailer under which the retailer's drivers, who were not members of Local 227, would pick up and deliver the bakery products. (Tr. A 21). This incident became the focal point of negotiations when the collective bargaining agreement between Local 227 and the bakers expired in 1962 and had to be renegotiated. (Tr. VI 182; IX 166-69). The new agreement, when finally signed after more than four months of negotiations, contained a new provision—Article IV (See Petn. A-22)—insisted upon by the union under threat of strike, which obliged the bakers to continue using the traditional "rack service" of Local 227 members in delivering and selling their bakery products. (Tr. IV 176-82). A "grandfather" clause allowed those bakers who had used different delivery techniques for some customers prior to the adoption of Article IV to continue using those delivery techniques for only those

specific customers. (Tr. A 22; IV 180-81; See Petn. A-4).

Granddad began its operations in 1963, after the 1962 collective bargaining agreement. (Tr. A 37-38). Granddad was not a baker, but instead purchased from bakers and resold to retailers through delivery techniques generally inconsistent with the "rack service" provided by Local 227 members. (See Petn. A-4). Since Granddad was not a customer of any baker prior to the adoption of Article IV, it could not qualify for the "grandfather" sales permitted by Article IV. Accordingly, it was unable to purchase bakery products from the wholesale bakers who had signed the collective bargaining agreement with the Teamsters.

In 1971, Granddad instituted this action in the United States District Court for the Western District of Washington charging Continental, four other bakers, and Local 227 with conspiracy in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and monopolization and attempted monopolization in violation of Section 2 of the Sherman Act. Subsequently, a price discrimination count under the Robinson-Patman Act, 15 U.S.C. § 13(a), was added to the complaint. Pursuant to a settlement, complaints against all the defendants, except Continental, were dismissed prior to trial. (See Petn. A-2).

Granddad's proof at trial focused in large part on the relationship between the bakers and the Teamsters and upon Teamster activities allegedly aimed at damaging Granddad's business. In support of its damage claim, Granddad identified three specific causes of its injury. First, although Granddad had been able to find a satisfactory Canadian supplier of bread, it was

unable to purchase other bakery products from that supplier. Since the Seattle bakers could not sell Granddad these items because of Article IV, Granddad claimed that it was the victim of a concerted refusal to deal. (Pl. Exh. 113H; Tr. V 65). Second, Granddad complained that but for the alleged harrassment of its customers by the Teamsters, purported threats of Continental directed at those customers, and the bakers' alleged price discrimination, it would have sold a much larger volume of bread. (Pl. Exh. 113G; Tr. V 41). Third, Granddad complained that the bakers and Teamsters had conspired to maintain a one cent per loaf lower price during a 16-month period, thus causing it to realize a reduced volume of revenues during that period. (Pl. Exh. 113G; Tr. V 41).

The jury rejected Granddad's claims that Continental had monopolized or attempted to monopolize the Seattle bread market, but rendered a verdict for Granddad on the conspiracy and price discrimination counts. (See Petn. A-2). The jury went on to determine that Granddad had suffered actual damages of $150,000. The district court subsequently entered judgment n.o.v. for Continental on the price discrimination count, but refused to set aside the jury's verdict on the conspiracy counts.[1]

Continental appealed the district court's refusal to set aside the conspiracy counts, arguing that the collective bargaining agreement could not serve as the basis for making Continental liable for the acts of the

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[1] The district court left standing the jury's damage award, trebling it to $450,000, adding an additional $50,000 for attorneys fees, but subtracting $100,000 reflecting Granddad's settlement with other defendants prior to trial. Thus, judgment was entered for Granddad in an amount of $400,000 plus costs.

Teamsters or other bakers.[2] Continental also argued that, aside from the collective bargaining agreement, there was no evidence of any agreement between the bakers or with the Teamsters that could give rise to the conspiracy alleged by Granddad.[3]

On December 14, 1977, a panel of the United States Court of Appeals for the Ninth Circuit, after receiving briefs and hearing oral argument, remanded the case to the district court for reconsideration of that court's denial of Continental's motion for judgment n.o.v. on the conspiracy counts. (Petn. A-16). In taking this action, the Ninth Circuit referred solely to intervening decisions involving the scope of the labor exemption from the antitrust laws, thus suggesting it had found Granddad's non-labor-related evidence insufficient to support the jury's verdict.

On remand, the district court entered an order granting Continental's motion for judgment n.o.v. The district court found that the jury should not have been allowed to consider the collective bargaining agree-

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[2] In attempting to meet Continental's arguments in the Ninth Circuit, Granddad recited, as it has in its petition to this Court, testimony given by its two principals to the effect that Continental's plant manager in 1969 attempted to persuade Granddad to join a conspiracy to increase prices in the Seattle market. As Continental argued below, such evidence was never related by Granddad to its damage proof. Also, there was no proof that such a conspiracy had succeeded. In any case, had there been a successful concerted effort of the bakers to raise prices in the Seattle market, Granddad would have profited from that effort.

[3] Continental also contended that in light of the jury's findings against Granddad on the monopolization counts and the trial court's judgment n.o.v. on the Robinson-Patman count, which was not appealed by Granddad, the damages awarded to Granddad were excessive and should be remitted to a much smaller figure.

ment as evidence of a conspiracy and that there was insufficient other evidence to support a conspiracy verdict. (Petn. A-47).

On November 23, 1979, the district court's judgment was affirmed by another panel of the Ninth Circuit. (Petn. A-1). On February 21, 1980, the Ninth Circuit entered an order denying Granddad's petition for rehearing and rehearing *en banc*. (Petn. A-18).

REASONS FOR DENYING THE WRIT

Granddad's petition characterizes the decision below as establishing a new exception to the antitrust laws—that a collective bargaining agreement immunizes all other antitrust liability associated with the activities of the employers and unions who have signed that agreement. That characterization is simply wrong.

As is clear on its face, the opinion of the Ninth Circuit correctly applied decisions of this Court defining the scope of the labor exemption from the antitrust laws and concluded that the collective bargaining agreement could not, standing alone, sustain Granddad's conspiracy verdict. Then, reviewing the evidence unrelated to the agreement and, like the district court, finding it insufficient, the Ninth Circuit affirmed the entry of judgment n.o.v. for Continental. This straightforward application of well established legal principles should not occasion the exercise of this Court's certiorari jurisdiction.

I.

It is settled that a multi-employer collective bargaining agreement is not subject to antitrust attack merely because it restrains competition. As this Court

held in *United Mine Workers* v. *Pennington,* 381 U.S. 657, 664:

> "The union benefit from the wage scale agreed upon is direct and concrete and the effect on the product market, though clearly present, results from the elimination of competition based on wages among the employers in the bargaining unit, which is not the kind of restraint Congress intended the Sherman Act to proscribe. We think it beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws . . . ." (Citations omitted).

This Court reached a similar conclusion with respect to other terms and conditions of employment in *Local 189, Amal. Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676.

As these and other cases show, collective bargaining agreements are immune from antitrust attack unless the plaintiff establishes that the challenged terms and conditions, either on their face or as implemented, do not regulate the employment relationship between the union and signatory employers in a manner consistent with federal labor policy. Collective bargaining agreements violate the antitrust laws only if they are unrelated to that relationship and seek to impose terms and conditions of employment on third parties or otherwise hamper their competition. *United Mine Workers* v. *Pennington, supra,* 381 U.S. at 665-666; *Local 189, Amal. Meat Cutters* v. *Jewel Tea Co., supra,* 381 U.S. at 688-697.

The type of provision in the collective bargaining agreement attacked by Granddad here is clearly consistent with federal labor policy. Thus, the Court held in *Fibreboard Paper Products Corp.* v. *NLRB,* 379

U.S. 203, 209, that union demands for preservation of "work previously performed by members of an existing bargaining unit is a subject about which the National Labor Relations Act [NLRA] requires employers and the representatives of their employees to bargain collectively." Subsequently, the Court held that collective bargaining provisions insisted upon by labor unions in an effort to preserve their traditional functions with the signatory employer are lawful under the NLRA. *National Woodwork Manufacturers Ass'n* v. *NLRB,* 386 U.S. 612.

To overcome these cases, Granddad argued below and contends here that Article IV of the collective bargaining agreement was not a valid work preservation clause, but instead was "a violation on its face of Section 8(e) of the NLRA." (Petn. 31). However, *National Woodwork* held that the only circumstances in which work preservation clauses might run afoul of the NLRA would be where the evidence establishes that the intent of the union was not "primary"—*i.e.,* sought by the union to preserve work traditionally performed by its members for the signatory employers —but was instead "secondary"—*i.e.,* designed to impact third parties by forcing the unionization of their employees or the imposition of union terms and conditions upon them. 386 U.S. at 620.

In *NLRB* v. *Pipefitters,* 429 U.S. 507, 525-526, this Court further articulated the distinction between a union's "primary" work preservation goals and illicit "secondary" objectives:

> "[T]he [NLRB] has continued to interpret and apply § 8(b)(4)(B) [of the National Labor Relations Act] to find an unfair labor practice, at least where the union employs a product boycott to claim work that the immediate employer is not in

> a position to award, and it has declined to find a violation where the employer has such power, *even if awarding the work might cause him to terminate contractual relations with another employer.* In the latter circumstances, the *cease-doing-business consequences are merely incidental to primary activity,* but not in the former where the union, if it is to obtain work, must intend to exert pressure on one or more other employers." (Citations omitted; emphasis added).

The Ninth Circuit properly followed the rule of *National Woodwork* and *Pipefitters* and found that Article IV was a valid work preservation clause not violative of Section 8(e) of the NLRA. (Petn. A-6/A-7). Continental clearly controlled the delivery work in question so that the union's objectives were primary. Thus, the clause did not involve prohibited secondary activity either in its original intendment or application. As *Pipefitters* makes clear, the fact that a work preservation clause may affect third parties does not render it unlawful secondary activity. Thus, the lower courts' decisions are entirely consistent with decisions of this Court and those of other circuits upholding the antitrust immunity of collective bargaining agreements.

II.

Apart from its unsuccessful attempt to prove the invalidity of the collective bargaining agreement, Granddad asserts that the Ninth Circuit also erred by letting its views as to the lawfulness of that agreement control its consideration of the rest of the evidence developed by Granddad in support of its case. Granddad's contentions in this regard are clearly belied by the Ninth Circuit's opinion in this case.

After discussing the status of Article IV under the antitrust laws and finding that "the jury should not have been allowed to consider the labor-related aspects of this case" (Petn. A-8), the court stated that it "must also consider the non-labor-related aspects of this case." (Petn. A-9). Thoroughly discussing those portions of Granddad's proof unrelated to the relationship between the bakers and the Teamsters and concluding that "[a]t best, Granddad was only able to show parallel action" between the bakers that was "not enough to establish any type of agreement" that could have injured Granddad (Petn. A-10), the Ninth Circuit affirmed the district court's entry of judgment n.o.v. for Continental. Patently, there is no substance to Granddad's contention that the Ninth Circuit allowed its view as to the lawfulness of the collective bargaining agreement to control its disposition of the other issues raised in this case.

Since Granddad has not briefed the issue of the sufficiency of the non-labor-related evidence, we need not deal with that question here. Continental does, however, note that Granddad merely seeks to have this Court review the concurrent findings of the two lower courts as to the insufficiency of this portion of Granddad's proof. This Court has repeatedly made it clear that it will not exercise its certiorari jurisdiction to resolve such factual issues. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, *aff'd on rehearing*, 339 U.S. 605; *Baker* v. *Schofield*, 243 U.S. 114; *Texas & Pacific Railway Co.* v. *Railroad Comm'n of La.*, 232 U.S. 338.

CONCLUSION

For all the reasons stated above, Granddad's petition for writ of certiorari should be denied.

Respectfully submitted,

E. EDWARD BRUCE
CORINNE A. GOLDSTEIN
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

NANCY P. GIBBS
DAVIS, WRIGHT, TODD,
REISE & JONES
4200 Seattle-First National
Bank Building
Seattle, Washington 98154

Attorneys for Respondent
Continental Baking Company